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No. 90-113

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1990

CLINCHFIELD COAL COMPANY, PETITIONER

*v.*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND JOHN A. TAYLOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT

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## QUESTIONS PRESENTED

1. Whether the rebuttal provisions of a Department of Labor regulation satisfy Section 402(f)(2) of the Black Lung Benefits Act of 1972, which requires the Department to apply "[c]riteria * * * not [illegible] more restrictive" than criteria applied during an earlier phase of the black lung program.

2. Whether the statute, if construed to invalidate the Department's rebuttal provisions, violates the constitutional guarantee of due process.



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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-16a) is reported at 895 F.2d 178. The decision and order of the Benefits Review Board (Pet. App. 17a-19a) and the decision and order of the administrative law judge (Pet. App. 20a-32a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on February 5, 1990. The order denying the petition for rehearing was entered on April 20, 1990 (Pet. App. 1a). The petition for a writ of certiorari was filed on July 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Black Lung Benefits Act of 1972, 30 U.S.C. 901 *et seq.*, provides benefits to former coal miners and their survivors for total disability or death due to pneumoconiosis. Disability claims filed by June 30, 1973, were considered by the Department of Health, Education, and Welfare (HEW) under regulations that included a presumption of entitlement to benefits (20 C.F.R. 410.490) that was available to certain claimants. Claims filed after that date are considered by the Department of Labor. Claims filed with the Department of Labor before April 1, 1980, are subject to Section 402(f)(2) of the statute, 30 U.S.C. 902(f)(2), which provides that the "[c]riteria" applied to those claims "shall not be more restrictive than the criteria applicable to a claim" adjudicated by HEW. See *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 108-111 (1988).

In response to Section 402(f)(2), Labor promulgated its own presumption regulation, 20 C.F.R. 727.203. While there were only two ways to invoke HEW's presumption (see 20 C.F.R. 410.490(b)(1)), there are five ways to invoke Labor's presumption. See 20 C.F.R. 727.203(a)(1)-(5). Once the presumption has been invoked, HEW's regulation specified that the presumption could be rebutted (1) by proving that the miner was doing his usual coal mine work or comparable work, or (2) by proving that the miner was capable of doing such work. 20 C.F.R. 410.490(c)(1) and (2). In contrast, Labor's regulation specifies four rebuttal methods. The first two generally correspond to the two specified HEW methods. 20 C.F.R. 727.203(b)(1) and (2). The third and fourth Labor methods allow a party contesting entitlement to defeat a claim either (3) by proving that the disability or death of the miner did not arise in whole or in part from coal mine employment or (4) by proving that the miner does not or did not have pneumoconiosis. 20 C.F.R. 727.203(b)(3) and (4).



2. In 1976, after 12 years of coal mining, John Taylor applied for black lung benefits. Pet. App. 5a, 24a. A deputy commissioner in the Department of Labor's Office of Workers' Compensation Programs (OWCP) initially found him eligible for benefits, but Clinchfield Coal Company, the responsible coal mine operator, contested eligibility and obtained a hearing before an administrative law judge. *Id.* at 5a. The ALJ found that Taylor had properly invoked the presumption of eligibility for benefits based on his 12 years of coal mining and on blood gas tests showing an impairment in the transfer of oxygen from his lungs to his blood. *Id.* at 6a, 24a-26a.

The ALJ also concluded, however, that Clinchfield Coal had rebutted the presumption under Labor's third and fourth rebuttal methods by proving that Taylor was not totally disabled from coal mining and, indeed, did not have pneumoconiosis. Pet. App. 31a. The ALJ relied on negative x-ray evidence, non-qualifying ventilatory test scores, and medical reports that he found more persuasive than conflicting x-ray readings and medical reports. That evidence supported the conclusion that Taylor suffered from chronic bronchitis caused by obesity and 30 years of cigarette smoking rather than from pneumoconiosis. *Id.* at 27a-31a. Accordingly, the ALJ denied benefits. *Id.* at 31a.

The Benefits Review Board affirmed, concluding that the ALJ's decision was supported by substantial evidence. Pet. App. 18a-19a.

3. The court of appeals reversed. Pet. App. 4a-16a. It first dismissed the argument that Labor's regulation cannot be considered "more restrictive" than HEW's regulation as applied to Taylor because (a) he invoked the presumption based on blood gas studies, a method of invocation available under Labor's regulation but not HEW's, and (b) the ALJ concluded that Taylor could *not* invoke the presumption under HEW's regulation on the basis of his x-rays and ventilatory test scores. Pet. App. 11a, 27a. The court thought it "a matter of indifference" how the claimant invoked the presumption of eligibility and therefore did not accept "any argument that the rebuttal provisions [of Labor's regulation] must be pegged to the invocation provisions." *Id.* at 11a.

Relying largely on its decision in *Broyles* v. *Director, OWCP*, 824 F.2d 327 (4th Cir. 1987), aff'd *sub nom. Pittston Coal Group* v. *Sebben*, 488 U.S. 105 (1988), the court determined that Labor's third and fourth rebuttal methods "permit rebuttal of more elements of entitlement to benefits than do the interim HEW regulations which permit rebuttal solely through attacks on the element of total disability." Pet. App. 12a. The court then concluded that these additional methods violate Section 402(f)(2), a result the court acknowledged to be "inconsistent" with the Sixth Circuit's decision in *Youghiogheny & Ohio Coal Co.* v. *Milliken*, 866 F.2d 195 (6th Cir. 1989). Pet. App. 12a-13a & n.2.

Having invalidated Labor's rebuttal methods, the court then qualified its opinion by reading HEW's regulation as allowing a rebuttal method "similar" to Labor's third method, which authorizes rebuttal by proof that the claimant's disability was not caused by coal mine employment. Pet. App. 14a. The court



remanded the case for further consideration of that issue. *Id.* at 14a-15a.

Chief Judge Ervin dissented. Pet. App. 15a-16a. He agreed with the majority that its decision conflicted with the Sixth Circuit's decision in *Youghiogheny & Ohio Coal Co.* v. *Milliken* and also noted a conflict with the Third Circuit's decision in *Bethenergy Mines, Inc.* v. *Director, OWCP*, 890 F.2d 1295 (1989), petition for cert. pending, No. 89-1714 (filed May 7, 1990). In his view, the approach of the Sixth and Third Circuits did "less violence to congressional intent, and avoid[ed] both upsetting the statutory scheme and raising due process problems." Pet. App. 16a.

## ARGUMENT

We agree with petitioner that the court of appeals erred. The black lung program provides benefits to coal miners who are totally disabled due to pneumoconiosis, and neither HEW nor the Department of Labor intended that its regulations would authorize benefits where, as here, the claimant does not have pneumoconiosis. Nor was that Congress's intent in establishing the program or in enacting Section 402(f)(2). Moreover, there is an express conflict in the circuits as to the validity of Labor's third and fourth rebuttal methods, and the conflict may affect as many as 3,500 pending cases. For the reasons discussed more fully in our brief in *Pauley* v. *Bethenergy Mines, Inc.*, No. 89-1714, we agree with petitioner that review by this Court is warranted.[1]

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[1] We are serving a copy of our brief and of our supplemental brief in *Pauley* on the other parties in this case. We are also serving a copy of our brief in No. 90-114, *Consolidation Coal Co.* v. *Dayton*, on the other parties.

However, review of the decision in this case will not necessarily resolve the conflict. As petitioner states (Pet. 8), the "twist" in this case is that the presumption was invoked by blood gas studies, a method not available under HEW's regulation, and Taylor could not invoke the presumption under the methods available under HEW's regulation. Pet. App. 27a. Thus, under HEW's regulation, Taylor would not be entitled to benefits. Since Taylor's claim fails under both regulations, we believe that Labor's regulation cannot be considered more restrictive than HEW's with respect to his claim. In other words, we think the court of appeals erred by concluding (Pet. App. 11a) that it is a "matter of indifference" how the presumption was invoked. If the Court were to agree with that conclusion—on what would logically be the first issue to be considered—then it would not reach the issue on which the courts of appeals are divided: whether the additional rebuttal methods in Labor's regulation may be employed when a claimant invokes the presumption in a manner consistent with HEW's regulation.[2] Accordingly, we recommend that the Court hold this case for disposition in light of No. 89-1714, *Pauley* v. *Bethenergy Mines Corp.*, or No. 90-114, *Consolidation Coal Co.* v. *Dayton*, since review by this Court of either of those cases should resolve the conflict in the circuits.

[2] The fact that this case is in an interlocutory posture also weighs against review, although not heavily in our view. The Fourth Circuit recently retreated from the suggestion in this case that HEW's regulation provided a method of rebuttal similar to Labor's third method. In an unpublished decision, the court concluded that this suggestion was "dicta" and that HEW's regulation allowed only two rebuttal methods. *Robinette* v. *Director, OWCP*, No. 88-1144 (4th Cir. Apr. 27, 1990), slip op. 8 & n.9, petition for cert. pending, No. 90-172 (filed July 25, 1990). See also *Krahel* v. *Consolidation Coal Co.*, No. 89-2394 (4th Cir. Apr. 5, 1990) (unpublished), slip op. 5-6 ("we have recently held that application of the rebuttal provisions of 20 C.F.R. § 727.203(b)(3) and (4) violates 30 U.S.C. § 902(f)"). Under that view, all that the Board would need to do on remand would be to enter an order awarding benefits.



## CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition of the petitions in No. 89-1714, *Pauley* v. *Bethenergy Mines Corp.*, and No. 90-114, *Consolidation Coal Co.* v. *Dayton*.

Respectfully submitted.

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